EDITOR'S NOTE

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No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSEPH A. BARNES, LUCILLE N. BARNES, CLARENCE H. BERG, PETER J. NEMEC, and AGNES C. NEMEC, Petitioners,

v.

DONALD P. HODEL*, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; and THE BUREAU OF LAND MANAGEMENT, OREGON STATE OFFICE; Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ATTORNEY FOR PETITIONERS

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*Donald P. Hodel has been substituted for William P. Clark as Respondent in the appeal below pursuant to Fed.R.App.P. 43(c)(1)

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the final decision of a hearings officer in a contested administrative proceeding is governed by the principles of res judicata with respect to issues decided in that proceeding once the time for appeal has lapsed and no appeal is taken.

2. Whether the United States may rely upon the provisions of a repealed statute as authority for the reservation of surface rights on mineral land subsequently patented.

3. Whether the United States is bound by the decision rendered by the District Court in United States v. Oregon & C. R.R. Co., 8 F.2d 645 (D.C. Or. 1925), in which case the question of the application of the mineral exception in the grant to the railroad was considered and determined.

PARTIES TO THE PROCEEDINGS

The case caption includes all parties to this proceeding. It should, however, be noted that Donald P. Hodel's name in the case caption is followed by an asterisk. This indicates that Donald P. Hodel was substituted for William P. Clark in the appeal below pursuant to Fed. R. App. P. 43 (c)(1).

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Petitioners Joseph A. Barnes, Lucille N. Barnes, Clarence H. Berg, Peter J. Nemec and Agnes C. Nemec, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 9, 1987.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The judgment of the trial court filed March 31, 1986, the order of the trial court filed March 27, 1986, and the the Magistrate's Findings and Recommendations filed August 29, 1985 appear in the Appendix hereto. Also included in the Appendix are the decisions of the Board of Land Appeals of the Department of the Interior entered on December 13, 1983 and the Hearings Officer's Decision in Contest No. Oregon 01453-A entered on September 13, 1966.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 9, 1987. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The O & C grant acts: the Act of July 25, 1866 (14 Stat. 239); the Act of April 10, 1869 (16 Stat. 47); and the Act of May 4, 1870 (16 Stat. 94).

2. The Revestment Act of June 9, 1916 (39 Stat. 218).

3. The Sustained Yield Act of August 28, 1937 (50 Stat. 874).

4. The Act to Reopen the O & C land to mineral entry of April 8, 1948 (62 Stat. 162).

5. United States Code, Title 30 §§ 601 to 615 (the Act of July 23, 1955).

§ 615. Limitation of Existing Rights.

"Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located, except as such rights may be limited or restricted as a result of a proceeding pursuant to section 5 of this Act[30 U.S.C. § 613] or as a result of a waiver and relinquishment pursuant to section 6 of this Act [30 U.S.C. § 614]; and nothing in this Act shall be construed in any manner to authorize inclusion in any patent hereafter issued under the mining laws of the United States for any mining claim heretofore or hereafter located, or any reservation not otherwise authorized by law, or to limit or repeal any existing authority to include any reservation, limitation or restriction in any such patent, or to limit or restrict any use of the lands covered by any patented or unpatented mining claim by the United States, its lessees, permittees, and licensees which is otherwise authorized by law. (July 23, 1955, ch. 375 § 7, 69 Stat. 372)."

STATEMENT OF THE CASE

A. PRESENT PROCEEDINGS

On June 15, 1983, the Bureau of Land Management issued Mineral Patent No. 36-83-0013 to Petitioners. The Patent conveyed fee simple title to 114.22 acres of land and was issued subject to the following

contested timber rights:

> "2. Under authority of section 3 of the Act of June 9, 1916 (39 Stat. 218),the timber now on lots 9, 15, 18, and 22 of the described land, ...
>
> "3. The timber now or hereafter growing on that 20 acre portion of the High Bar Association placer claim covering the Oro Grande Placer Mining Claim located July 19, 1938, ... subject to the provisions of April 8, 1948 (62 Stat. 162); ..."

Petitioners protested against the form in which BLM issued the patent, claiming that they have a vested right to the surface resources. BLM denied the protest by decision dated August 17, 1983. Petitioners appealed that decision to the Interior Board of Land Appeals in Arlington, Virginia. The Board affirmed the BLM decision in its Decision No. IBLA 83-992 on December 13, 1983. A Petition for Writ of Review and Alternate Writ of Mandamus was filed in the District Court for the District of Oregon. Both parties filed summary judgment motions which were heard by Magistrate Hogan. He recommended summary judgment against the

Petitioners. After a judicial review of Magistrate Hogan's Findings and Recommendations, the District Court entered summary judgment for the United States and a judgment dismissing Plaintiffs' amended petition. Petitioners then appealed to the Court of Appeals for the Ninth Circuit which entered its opinion affirming the trial court on June 9, 1987.

B. ADMINISTRATIVE PROCEEDINGS

Petitioners contend that the United States is estopped to deny the claimants' rights to surface resources by the final decision of the hearing examiner as entered September 13, 1966 in Contest No. Oregon 014538-A undertaken pursuant to section 5 of the Act of July 23, 1955 (30 U.S.C. § 613).

BLM instituted such proceedings in 1964. Petitioners and their predecessors in interest submitted a verified statement asserting that they claimed right, title,

and interest in the vegetative surface resources and other surface resources, which were contrary to and in conflict with the limitations and restrictions specified in section 4, 30 U.S.C. § 612. Petitioners prevailed in the proceeding and the final decision recognizing and accepting the Petitioners claims was entered on September 13, 1966.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of this Court regarding the application of the collateral estoppel aspect of res judicata and further conflicts with the decisions of this Court regarding the effect to be given a repealed statute.

A. COLLATERAL ESTOPPEL

Unless otherwise excluded by law, a patent entered on a mineral claim conveys fee simple title to all the land, including the surface resources. Delmonte M. & M. Co. v. Last Chance M. & M. Co., 171 U.S. 55, 18

S.Ct. 895, 43 L.Ed. 176 (1898).

The timber rights contested in this case were reserved to the United States under authority of section 3 of the Act of June 9, 1916 (39 Stat. 218) and under the provisions of the Act of April 8, 1948 (62 Stat. 162). One of Petitioners' claims was filed on June 3, 1916 and was relocated on July 19, 1938. The other four claims were located after June 9, 1916 and prior to August 28, 1937.

The original grant by Congress to the O & C Railroad reserved to the United States all mineral lands from those granted. Section 19, the section within which all of Petitioners' claims are located, was patented to the O & C Railroad in 1895. Prior to that date, five mineral claims were located in Section 19.

The Revestment Act (39 Stat. 218) provided for a proceeding to be brought by the United States Attorney to finally determine

the remaining issues between the United States and the railroad. An opinion was entered by the court on September 14, 1925. See, United States v. Oregon and California R.R. Co., supra. In the opinion and final decree, the court ruled that almost two million acres of the lands granted did not originally pass to the O & C Railroad because of the mineral character of the land. In that decision, the court quieted title to all land within the grant, including that which had been patented and that which remained unpatented. The decision does not specifically set out descriptions of the various classes of land. The Petitioners contended that Section 19 was among those two million acres which did not originally pass to the railroad and, as such, was not within the provisions of the Revestment Act of June 9, 1916 (39 Stat. 218). The court below determined that the Petitioners' claim failed for want of proof, even though

the court below acknowledged the five mineral claims in Section 19 which were filed prior to patenting of the land to the railroad. These claims are certainly compelling evidence that Section 19 was within the acres excluded by the 1925 decision and the 1926 decree of Judge Wolverton. The land was then believed to be mineral in character, and was, on two subsequent occasions, found to be mineral land: in the 1966 proceeding and again at the time of issuing the patent to Petitioners.

The interpretation to be given the decision of the Oregon trial court was before the Court of Appeals for the District of Columbia in Clackamas Co.,Ore. v. McKay, 219 F.2d 479 (D.C. Or. 1954). There, the court held:

> "The action in the District Court of Oregon was brought by the United States. Having thus consented, it was a party, and it and all its agents were bound by the courts decision. We think, and hold, that the Secretary of Agriculture and all other government officers were and are bound to recognize

and abide by that court's findings." Id. at 496.

B. 1966 ADMINISTRATIVE PROCEEDING

The provisions of 30 U.S.C. § 612 provide that any mining claim "hereafter located" shall not be used prior to the issuance of patent for purposes other than mining and reserves to the United States the management and disposition of surface resources on such claims. Section 613 establishes a procedure for determining whether mining claims located prior to the date of the Act of July 23, 1955 (69 Stat. 368) would be subject to the provisions of section 612. It provides that the head of the federal agency responsible for administering the surface resources for the land of the United States may institute proceedings leading to a determination of surface rights. A mining claimant asserting a right to the surface resources must then file a verified statement. If the verified statement is filed, the Secretary of the Interior must then

schedule a hearing to determine the validity and effectiveness of any right, title, or interest in the mining claim asserted by the claimant. BLM instituted such proceedings in 1964. Petitioners and their predecessors in interest presented a verified statement. That statement asserted that they claimed right, title, and interest in the vegetative surface resources which are contrary to, and in conflict with, the restrictions specified in section 4 (69 Stat. 368). A notice of hearing issued on June 22, 1966. That notice stated:

> 2. Nature of the Proceedings. The hearing will be held for the purpose of receiving oral testimony under oath and documentary evidence, bearing upon any and all material issues in the above entitled matter.

Subsequently, BLM recognized and accepted the Petitioners' claims and so informed the hearing examiner. In his final decision, the hearing examiner recited:

> On August 18, 1966, the Land Office, Bureau of Land Management, Portland, Oregon, advised that it has accepted

> the rights claimed and asserted by the mining claimants and requested that the hearing be cancelled.
>
> Since the Bureau of Land Management has recognized and accepted the rights claimed and asserted by the mining claimants, a hearing pursuant to section 5(c) of the Act of July 23, 1955, (69 Stat. 369) will not be held as to the above identified and described unpatented mining claims.

The final decisions of a hearing examiner in an administrative adjudicatory proceeding is governed by res judicata and collateral estoppel principles. Atlantic Refining Co. v. Federal Trade Com.,381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965). An order of an administrative agency finally determines the rights of the parties before it subject to judicial review of the order. Columbia Broadcasting System,Inc. v. United States, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942). An administrative decision of an adjudicatory character binds the parties to the proceedings and is res judicata, thereby precluding a subsequent judicial proceeding between the parties regarding

the matters litigated in the administrative action. International Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 65 S.Ct. 116, 89 L.Ed. 1649 (1945); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251 (1941), reh. denied, 313 U.S. 599, 61 S.Ct. 1093, 85 L.Ed. 1551 (1941).

The issue before this Court is precisely the same issue that was before the hearings officer in the 1966 administrative proceedings, i.e. Petitioners' claims to the surface resources of the land.

Res judicata provides that when a court of competent jurisdiction has entered a valid final judgment the parties to the suit and their privies are thereafter bound, not only as to every matter that was offered and received to sustain or defeat the claim or demand, but also as to any other admissable matter which might have been offered for that purpose. Commissioner v. Sunnen,

333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948), conformed to, 168 F.2d 839 (1948). The doctrine of res judicata precludes a party from splitting his cause of action so as to make several actions with respect to claims then capable of recovery in the first action. Mendez v. Bowie, 118 F.2d 435 (1st Cir. Puerto Rico 1941), cert. denied, 314 U.S. 639, 62 S.Ct. 76, 86 L.Ed. 513 (1941).

The court below believed that the language of 30 U.S.C. § 615 permitted the United States to relitigate the matters which were litigated in 1966 in the 1983 proceedings to patent the land.

The finality to be given to final decisions in adjudicatory administrative proceedings is an important legal issue which extends far beyond the confines of this case. Such final decisions have been determined by this Court to be governed by res judicata and collateral estoppel principles. Atlantic Refining Co. v. Federal

Trade Com., supra.

Congress has not repealed the principles of res judicata. In the 1955 Act (30 U.S.C. 601, et seq.), it provided for a determination to be made, in the proceedings enacted there, which would quiet title to surface resources on claims in which the claimant asserted rights adverse to the United States. The proceeding contemplated by the Act may be interpreted consistently with ruling principles of law, including that of res judicata, by requiring that section 615 compelled the United States to assert its rights in the section 613 proceeding if it wanted to preserve them.

C. REPEALED STATUTE

The Act of August 28, 1937, commonly known as the "Sustained Yield Act," is codified beginning at 43 U.S.C. § 1181a. It states in material part:

> "Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218),

> and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and powersite lands valuable for timber, shall be managed, except as provided in section 3 hereof [40 U.S.C. § 1181(c)], for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [principle] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities..."

The final provision of the Act, denoted Title II, § 201(c) (50 Stat. 876), provided:

> "All Acts or parts of Acts in conflict with this Act (citation omitted) are hereby repealed to the extent necessary to give full force and effect to this Act."

A statute providing for the repeal of all inconsistent laws is effective to accomplish such repeal. 82 C.J.S., Statutes, § 285.

The Department of the Interior con-

sidered the effect of this repealer in its opinion of August 25, 1941 entitled "APPLICABILITY OF MINING LAWS TO REVESTED OREGON AND CALIFORNIA AND RECONVEYED COOS BAY GRANT LANDS," 57 I.D. 365. For the reasons stated in that opinion, the Department concluded that section 3 of the Act of June 9, 1916 was repugnant to and inconsistent with the Act of August 28, 1937, and was therefore repealed by the same.

The opinion states:

> "The Act of 1937 expressly repealed all acts, and particularly any part or parts of the acts of June 9, 1916, and February 26, 1919, inconsistent with its provisions. ... The express notice taken in the act of 1937 of the act of 1916, including section 3 of the latter, plainly indicates an intention to abrogate it to the extent it is inconsistent with the act of 1937, ... the intention being clearly expressed in the act itself." Id. at 373.

The conclusion of the Department was:

> "As the law now stands, it is the conclusion of the Department that section 3 of the act of June 9, 1916, is clearly irreconcilable and in conflict with section 1 of the act of August 28, 1937, and the mineral land laws are no longer applicable to the lands classified

under that section: ..." Id. at 374.

Once repealed, the act is of no force and effect and must be considered as if it never existed. In Ex parte McCardel, 7 Wall. 506, 19 L.Ed. 265 (1869), this Court stated:

> "On the other hand, the general rule, supported by the best elementary writers (Dwarris, Stat. 538), is that 'when an Act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.'" Id. at 265

This rule has been consistently followed. Gustafson v. Rajkovich, 263 P.2d 540, 40 A.L.R. 2d. 520 (Ariz. 1953); Woolsey v. Lassen, 371 P.2d 587 (Ariz. 1962).

The affect of the repeal is "to obliterate the Act as if it never existed," In Interest of Weinstein, 386 N.E.2d 593 (Ill. 1979); it is "deemed never to have existed," Matter of Hoover's Estate, 251 N.W.2d 529 (Iowa 1977); the "repeal of the statutes had the effect of blotting them out completely as if they never existed, and stripped the courts of jurisdiction created by the void-

ed laws." Harkey v. Mobley, 552 S.W.2d 79 (Mo. 1977). See also, Chesapeake & Potomac Co. of West Virginia v. State Tax Dept.,339 S.E.2d 918 (W. Va. 1977).

When, in 1948, Congress again considered the question of the application of mineral laws of the United States to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, it recognized that section 3 of the Act of June 9, 1916 had been repealed. The Act of April 8, 1948 (62 Stat. § 162) is stated to be: "an Act to reopen the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road land grants to exploration, location, entry and disposition under the general mining laws." [Emphasis added]. This language could only be consistent with the view that section 3 of the Act of June 9, 1916 had previously been repealed by Congress. In the 1948 Act, Congress made no reference to the Act of June 9, 1916,

although it does specify the Acts of August 28, 1937 and "any other act relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, as affected by the 1948 Act."

The court below held that the second proviso of the first paragraph of the 1948 Act is a recognition by Congress that section 3 of the Act of June 9, 1916 was then subsisting. That proviso reads: "That locations made prior to August 28, 1937, may be perfected in accordance with the laws under which initiated.

Where an act is repealed by a later act, a subsequent recognition of the earlier act by the lawmaking body as a law still subsisting does not operate to prevent such repeal. District of Columbia v. Hutton, 143 U.S. 18, 12 S.Ct. 369, 36 L.Ed. 60 (1892). There, this Court stated:

> "It is contended, however, that by the act of January 31, 1883, (22 St. 412; Supp. Rev. St., 2d Ed., 397) congress recognized said section 354 as a still

> subsisting law, and that consideration should compel a reversal of the judgment below. We are not impressed with this contention. ..." Id. at 372

The Court held:

> "It is manifest, however, from an inspection of this section, that there was no recognition in it by congress that said section 354 was still subsisting law. But even if congress had supposed that that section was still the law, when, as a matter of fact it had been repealed, it would make no difference in this consideration, [citations omitted]. The question is was said section 354 repealed by the Act of 1878? That is a judicial question to be determined by the courts, upon proper construction of that section and subsequent legislation upon the same subject-matter, and is not for the legislative branch of the government to determine." Id. at 372.

Section 3 of the Act of June 9, 1916 is the statute relied upon by the BLM to authorize a restriction in the patent. That section was repealed by the Act of August 28, 1937. It did not exist in 1948. It did not exist in 1983. It cannot serve as authority for a timber reservation.

The reference in the second proviso of the 1948 Act could only have been to the

general mining laws of the United States enacted in 1872 and codified in 30 U.S.C. § 1, et seq. That is the only law which existed in 1948 and prior thereto under which the claims in issue were initiated.

The question of the effect to be given a repealed statute is an important principle of law and extends far beyond this case. This Court has not addressed the issue since Exparte McCardle, supra, in 1869. The court below apparently believed that decision lacked continuing vitality, for it did not follow the rule announced in that case. It decided this case to the contrary. The court below did not apply the law as set forth by this Court in District of Columbia v. Hutton, supra.

CONCLUSION

The decision below raises significant and recurring problems concerning the application of the principles of res judicata to final decisions in administrative proceed-

ings and regarding the legal effect to be given repealed statutes. Its decision conflicts with the decisions of this Court mentioned above. These conflicts justify the grant of certiorari to review the judgment below. For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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September 1, 1987

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STATUTES INVOLVED CONTINUED:

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH A. BARNES, LUCILLE N. BARNES, CLARENCE H. BERG, PETER J. NEMEC, and AGNES C. NEMEC, Plaintiffs-Appellants, vs. DONALD P. HODEL*, Secretary of the United States Department of the Interior, and BUREAU OF LAND MANAGEMENT, OREGON STATE OFFICE, Defendants-Appellees.	No. 86-3782 D.C.No. CV 84-6008-OMP OPINION

Argued May 6, 1987
Submitted May 13, 1987
Portland, Oregon

Filed June 9, 1987

Before: J. Blaine Anderson, Thomas Tang and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

Appeal from the United States District Court for the District of Oregon
Owen M. Panner, District Judge, Presiding

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*Donald P. Hodel has been substituted for William P. Clark as defendant in this appeal pursuant to Fed.R.App.P. 43(c)(1).

Barnes v. Hodel

SUMMARY

Mines and Minerals

Appeal from grant of summary judgment. Affirmed.

Appellants (collectively Barnes) were issued a mineral patent for part of Section 19, which reserved disposal of the timber to the United States. The district court rejected Barnes' challenge of the reservation.

[1] A valid mining claim encompasses the resources on the surface. [2] The Revestment Act provided that the revested lands which were classified as timberlands, such as Section 19, would be open for mineral entries but that the only timber on them that could be used by the mineral entrant would be for his mine. [3] The prior patent to the land is not open to collateral attack for fraud, error, or irregularity. [4] Barnes has produced no evidence to

support his claim that Section 19 was among the two million acres which did not revest under the Act. [5] The Surface Resources Act did not confer authority to repeal the reservation created by the Revestment Act.

COUNSEL

Edward Ray Fechtel, Portland, Oregon, for the plaintiffs-appellants.

William B. Lazarus, Washington, D.C., for the defendants-appellees.

OPINION

Joseph A. Barnes, Lucille N. Barnes, Clarence H. Berg, Peter J. Nemec, and Agnes C. Nemec (here collectively "Barnes") appeal from summary judgment in favor of the Secretary of the Interior. We affirm.

PROCEEDINGS

In 1983, Barnes was issued mineral patent No. 36-83-0013 for the Deep Diggings and High Bar placer mining claims encompas-

sing 114.22 acres of land described as "Willamette Meridian, Oregon. Township 29 South, Range 7 West, Section 19, Lots 9, 15, 18, 19, and 22" ("Section 19"). The patent reserved disposal of the timber to the United States.

Barnes appealed the reservation, made by the Oregon State Office of the Bureau of Land Management, to the Board of Land Appeals, a higher agency within the Department of the Interior. That Board, in an opinion authored by Administrative Judge Will A. Irwin and concurred in by Administrative Judges Douglas E. Henriques and Edmund W. Stuling, rejected Barnes' appeal. Barnes then brought this action in the district court to obtain an order requiring the Secretary of the Interior to issue a patent without restrictions.

Jurisdiction exists under 28 U.S.C. § 1331. Magistrate Hogan made findings and

recommendations rejecting Barnes' petition, and the district court gave summary judgment for the Secretary. This appeal followed.

ANALYSIS

[1] A valid mining claim encompasses the resources on the surface, Del Monte M and M Co. v. Last Chance M and M Co., 171 U.S. 55 (1898). Barnes bases his position on this general principle of property law. The principle prevails if the sovereign has not reserved the resources on the surface. The United States has reserved the rights to timber on Section 19.

[2] Section 19 was patented by the United States in 1895 to the Oregon and California Railroad Company (the "O & C"). Section 19, along with other land patented to the railroad was forfeited by the O & C to the United Sttes by the Revestment Act of 1916, 39 Stat. 218. The Act provided that the revested lands which were classi-

fied as timberlands by the Secretary of the Interior would be open for mineral entries but that the only timber on them that could be used by the mineral entrant would be for his mine; sale of the timber was reserved to the United States. On February 25, 1920 the Secretary of the Interior classified Section 19 as timberland. From that date forward, a mineral claim could not embrace the right to sell timber.

[3] Barnes attacks this conclusion in five ways. First, he notes that five mineral claims to land in Section 19 were filed prior to the patenting of the land to the O & C in 1895. Under the governing statute, the O & C was not entitled to mineral lands and was on notice of these prior claims. Its application for a patent must, therefore, have been grounded on misrepresentation, and the patent itself must have been wrongly issued. The short and conclu-

sive answer to this contention is that the patent issued to the O & C is not open to collateral attack for "fraud, error, or irregularity." Burke v. Southern Pacific R.R. Co., 234 U.S. 669, 711 (1914).

[4] Secondly, Barnes alleges that he is not attacking the patent collaterally but that it has already been judicially determined that the land subject to mineral claims did not pass to the O & C and so did not revest in the United States. United States v. Oregon and California R.R. Co., 8 F.2d 645 (D. Ore. 1925). This decision held that there were almost two million acres which did not originally pass to the O & C because of the mineral character of the land. This decision did not identify the lots here at issue as among those two million acres. Barnes has produced no evidence that they are. His claim falls for want of proof.

[5] Thirdly, Barnes contends that the United States is estopped to deny his claim to the timber. In 1964 Barnes began a proceeding before the Bureau of Land Management under the Surface Resources Act of 1955, 30 U.S.C. § 601-615. This act provided that, as to mining claims located after July 23, 1955, the United States had the right to manage and dispose of the vegetative surface resources. § 612. As to mining claims located before that date, a procedure was set up under § 613 by which a mining claimant could assert claims in conflict with the restrictions of § 612. Barnes complied with the § 613 procedure, asserted the claims to the surface resources here at issue, and in 1966 received a decision from a hearing examiner for the BLM that the BLM "accepted the rights claimed."

Superficially, Barnes' contention has strength. He overlooks, however, § 615,

which explicitly provides that the Surface Resources Act is in no way to be construed to limit or repeal existing authority to restrict or reserve any mining patent. The statute, in short, did not confer authority to repeal the reservation created by the Revestment Act.

Barnes argues that the legislative history manifests a congressional intent to quiet title to surface resources on locations made prior to 1955, and he invokes the language of H.R. Rep. No. 730, 84th Cong., 1st Sess., reprinted in 1955 U.S. Code Cong. & Admin. News at 2483. But the Committee Report also specifically states that the part of § 615 on which the Secretary relies is intended to respect the timber reservation on the revested O & C lands. Id. at 2487. The regulations issued under the 1955 act also indicate that all existing authority to restrict or reserve a patent

"continue[s] in full force and effect." 43 C.F.R. § 185.137 (1964); accord 43 C.F.R. § 3714.3 (1986).

Barnes' most attractive argument is that § 615 compels the United States to assert its rights if it wants to preserve them in a § 613 proceeding. "Nothing" in the Act is to be construed--so the first clause of § 615 specifies--to limit or restrict any existing rights of a claimant except as a right may be limited in proceedings under § 613. Section 615 goes on to say that "nothing" in subchapter II shall be construed to limit or repeal existing authority to restrict or reserve a patent. In this second clause of § 615 no exception is made for § 613 proceedings. Jurisdiction is not granted to repeal earlier congressional reservations.

[6] Fourthly, Barnes argues that the Revestment Act was repealed by the Sustained

Yield Act of August 28, 1937. The argument construes this act too broadly: the act provided that the management of the old O & C timberlands should be aimed at "permanent forest production," repealing inconsistent laws. 50 Stat. 874, 876. No intention was shown to recognize timber rights attached to mining claims located after 1916. In 1948 Congress cleared up whatever ambiguity existed by specifying that mineral claims located before the date of the Sustained Yield Act had to be perfected in accordance with the laws under which the claims had been initiated. 62 Stat. 162. The 1948 law effectively subordinated all of Barnes' claims, save the Oro Grande claim, to the Revestment Act.

Finally, Barnes maintains that his Oro Grande claim was a relocation of a claim originally located before the Revestment Act went into effect. But at that time the

land was still patented to the O & C, and the claim was void. The Oro Grande claim was effectively located only on July 19, 1938. Rights under this claim are governed by the Act of April 8, 1948, which expressly denied timber rights to entrants on the land after August 28, 1937. 62 Stat. 162.

Barnes' constitutional claims have also been considered. They are without merit.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH A. BARNES, et al	)	
	)	
Plaintiffs,	)	Civil No.
	)	84-6008-E
v.	)	
	)	
WILLIAM CLARK, et al	)	
	)	
Defendants.	)	JUDGMENT
	)	

Based on the record,

IT IS ORDERED AND ADJUDGED this action is dismissed.

DATED: March 31, 1986.

ROBERT M. CHRIST, CLERK

By/S/ Dan Marsh
Dan Marsh, Deputy

[FILED MARCH 31, 1986]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH A. BARNES, LUCILLE N. BARNES, CLARENCE H. BERG, PETER J. NEMEC and AGNES C. NEMEC, Plaintiff, v. WILLIAM CLARK, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, and the BUREAU OF LAND MANAGEMENT, OREGON STATE OFFICE, Defendants.	[FILED MARCH 27, 1986] CIVIL NO. 84-6008-E ORDER

Magistrate Michael R. Hogen filed his Findings and Recommendation on August 29, 1985. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. § 636 (b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d

1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiffs have timely filed objections. I have, therefore, given the file of this case a de novo review. I ADOPT the Magistrate's Findings and Recommendation that the decision of Administrative Law Judge Erwin in IBLA 83-992 is supported by substantial evidence and that the reservation by the Department of the Interior of timber and associated rights in patent number 36-83-0013 is proper. Plaintiffs' petition for writ of judicial review is the appropriate means to seek relief in this case, and, therefore, the alternative motion for a writ of mandamus need not be considered. Plaintiffs' constitutional claims have no merit. There are no disputed facts determinative of the legal issues in this case. Defendants' motion for summary judgment (#11) is GRANTED. Plaintiffs' motion for summary judgment (#7) is DENIED. This ac-

tion is DISMISSED.

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

DATED this 27 day of March, 1986.

/S/ Owen M. Panner
Owen M. Panner
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH A. BARNES, LUCILLE N. BARNES, CLARENCE H. BERG, PETER J. NEMEC and AGNES C. NEMEC,	)	[FILED AUGUST 29, 1985]
Plaintiffs,	)	Civil No. 84-6008-E
v.	)	
WILLIAM CLARK, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, and the BUREAU OF LAND MANAGEMENT, OREGON STATE OFFICE,	)	FINDINGS AND RECOMMEN-DATIONS
Defendants.	)	

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ATTORNEY FOR DEFENDANTS

HOGAN, Magistrate:

Petitioners seek judicial review of the Findings, Conclusions and Order of the United States Department of the Interior, Office

of Hearings and Appeals Interior Board of Land Appeals, dated December 13, 1983, in this proceeding filed pursuant to "5 U.S.C. § 701 et seq., 30 U.S.C. § 29 et seq., the general mining laws of the United States; R.S. 2329, 2331 as amended 30 U.S.C. § 35 (1976)". Petitioners seek a decree setting aside the above order of the Department of the Interior and an order requiring respondents to issue the patent of the United States for the land involved in these proceedings without exceptions and/or reservations.

Petitioners further seek an "Alternative Writ of Mandamus" compelling respondents to convey to petitioners the patent of the United States to the subject land without reservation of timber rights or show cause why it should not do so.

Writs of mandamus were abolished by Fed. R. Civ. P. 81(b), which provides in part that "relief heretofore available by

mandamus ... may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules". I find that the petition for writ of judicial review is the appropriate vehicle with which to seek relief in this case, and, therefore, I do not consider the alternative motion for a writ of mandamus.

Petitioners, hereinafter referred to as plaintiffs, and respondents, hereinafter referred to as defendants, have each moved the court for an order granting summary judgment in their favor (#7, #11 respectively).

II

The relevant facts are as follows. On June 15, 1983, the Department of Interior, Bureau of Land Management, issued mineral patent #36-83-0013 to plaintiffs. The patent conveys fee simple title to 114.22 acres of land encompassing the "Deep Diggins" and "High Bar" placer mining claims described as lots 9, 15, 18, 19, and 22,

section 19, township 29 south, range 7 west, Willamette Meridian, Douglas County, Oregon (hereinafter "section 19"). The patent was issued subject to certain conditions not here at issue and the reservation of timber rights as follows:

> 2. Under authority of section 13 of the Act of June 9, 1916 (39 Stat. 218) the lumber now on lots 9, 15, 18 and 22 of the described land, excepting and excluding that 20-acre portion of the High Bar association placer covering the Oro Grande placer mining claim located July 19, 1938, and recorded July 23, 1938, in Book 11 at Page 135, Mining Records of Douglas County, Oregon, together with the right of the purchaser of the timber to enter upon the land and to cut and remove the timber;
>
> 3. The timber now or hereafter growing on that 20-acre portion of the High Bar association placer covering the Oro Grande placer mining claim located July 19, 1938, and recorded July 23, 1938, in Book 11 at Page 135, Mining Records of Douglas County, Oregon, together with the right to manage and dispose of the timber as provided by law, in accordance with and subject to the provisions of the Act of April 8, 1948 (26 Stat. 162); ....

On August 8, 1983, plaintiffs filed a notice of protest and complaint with the Bureau of Land Management (BLM) contending

that they had a vested right in the surface resources of the subject land and that the reservation to the United States of the timber resources was improper. The BLM denied the protest by decision dated August 17, 1983. Plaintiffs appealed the BLM decision to the Interior Board of Land Appeals which affirmed the BLM decision in its decision #IBLA 83-992, dated December 13, 1983. Plaintiffs then filed the "Petition for Review and Petition for Alternative Writ of Mandamus" presently before the court.

Plaintiffs contend that the "one issue" raised by the present motions for summary judgment is whether the subject land is revested Oregon and California timber land (O & C land). Plaintiffs contend that if the land at issue is not revested O & C land, then plaintiffs are entitled to a patent without the reservation of surface resources authorized by the acts of 1937 and 1948. Plaintiffs argue that the land

encompassing the mining claims is not revested O & C land, by virtue of the fact that it was known to be mineral land at the time the patent for O & C land was issued to the Oregon and California Railroad Company.

III

A brief review of the history of what is known as Oregon and California timber land is essential to an understanding of the issues involved in this case.

By Act of July 25, 1866 (14 Stat. 239) and Act of May 4, 1870 (16 Stat. 94), Congress granted certain lands to the Oregon and California Railroad Company to aid in the construction of a railroad through Oregon. The lands were to be conveyed to the railroad by patent from time to time as the progress of the railroad advanced. The primary land grants were of alternate odd numbered sections within 20 miles of either side of the line of the railroad. Addition-

al grants were provided as indemnity grants for 10 miles on either side of the primary grants. The acts expressly excepted all mineral lands from the lands granted.

The original grants to the railroad provided that the railroad was obligated to sell the granted lands to settlers only in acreages not exceeding 160 acres each and for prices not exceeding $2.50 per acre. The railroad violated these conditions. Proceedings were commenced against the railroad for its violations of the terms of the grant and eventually the United States Supreme Court enjoined the O & C Railroad from making further sales or any disposition of lands or timber thereon in violation of the law. See generally, Oregon & California Railroad Company v. United States, 35 S.Ct. 908 (1914).

On June 9, 1916, Congress enacted the Revestment Act (39 Stat. 218) which declared the title to certain lands which had been

granted to the railroad revested in the United States. Section 3 of the Revestment Act provided for mineral entries on the revested lands and contained a general reservation of the title to timber in the case of mineral entries made thereafter.

By the Act of August 28, 1937 (50 Stat. 874, 43 U.S.C. §§ 1181a through 1181f, 1982), Congress provided for permanent forest production from O & C land. In the Act of April 8, 1948 (62 Stat. 162), Congress provided that the O & C timber land should be opened to mineral entry and validated claims filed after August 28, 1937, with the restriction that "any person who under such laws has entered since August 28, 1937, or shall hereafter enter any of the said lands, shall not acquire title, possessory or otherwise, to the timber now or hereafter growing thereon."

These restrictions are the authority upon which BLM has relied in excepting and

reserving timber rights from plaintiff's land patent. The BLM contends that the portion of plaintiffs' claims located prior to August 28, 1937, are subject to the reservation of timber in section 3 of the Act of June 9, 1916, and the portion of plaintiffs' claims located after August 28, 1937, are subject to the reservation of timber in the Act of April 8, 1948.

IV.

It is a general principal of mining law that, unless otherwise excluded by law, a patent entered on a mineral claim conveys fee simple title to all of the land including the surface resources. Delmonte M & M Company v. Last Chance M & M Company, 171 U.S. 55 (1898). See generally, 54 Am.Jur. 2nd, Mines & Minerals 20; 58 Corp.Jur.Sec. 97. The aforementioned acts (the Act of August 28, 1937 and the Act of April 8, 1948) recognized and fully protected the vested rights of mineral claimants to fee

simple title upon patent and preserves all rights to a mining claim located prior to the act that existed on the date of the act. See 43 CFR 3714.3; 43 CFR 185.137(a).

Plaintiffs contend that the restrictions authorized by the 1937 and 1948 acts do not apply to them because the subject land is not revested O & C land. This conclusion is based on plaintiff's contention that the land was known to be mineral land at the time the patent was issued to the railroad and therefore ownership should be considered not to have ever passed to the railroad.

V.

Plaintiffs contend that defendants are estopped to deny their purported rights to surface resources by virtue of the BLM decision of September 13, 1966, in Contest Number Oregon 014538-A undertaken pursuant to section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1976). Plaintiffs contend

that their right to surface resources on the subject lands was adjudicated and accepted by the BLM in that proceeding.

The Act of July 23, 1955, was intended to provide for the multiple use of the surface of public lands, among other purposes. 43 CFR 3710.03; 43 CFR 185.120 (1964). Section 4 of that Act, 30 U.S.C. § 612 (1976), provides that any mining claim "hereafter located" shall not be used prior to the issuance of patent for purposes other than mining and reserves to the United States the right to manage and dispose of the surface resources of such claim. See 43 CFR 3712.1. Section 5, 30 U.S.C. § 613 (1976), provides a procedure for determining whether mining claims located prior to the Act of July 23, 1955, would be subject to the provisions of section 4. In brief, the procedure provides that the head of a federal agency responsible for administering the surface resources of lands belonging to the

United States may initiate proceedings leading to a determination of surface rights by filing a request for publication of notice to mining claimants with the Secretary of the Interior. A mining claimant asserting a right to surface resources must then file a verified statement detailing certain information as to the claim. Failure to file the statement within the required time constitutes waiver and relinquishment of any right, title or interest under the mining claim contrary to or in conflict with the limitations and restrictions specified in Section 4 of the act. See 43 CFR 3713.2 through 3713.2 [sic]. If a verified statement is filed, the Secretary of the Interior must then schedule a hearing to determine the validity and effectiveness of any right, title or interest under the mining claim asserted by the mining claimant. See 43 CFR 3713.2. In order to establish any right to the surface resources, or in other

words the applicability of section 4, a mining claimant must prove that he made a discovery on his claim within the meaning of the mining laws prior to July 23, 1955. United States v. Paine, 68 I.D. 250 (1961); Converse v. Udahl, 399 F.2d 616 (1968), cert. denied, 393 U.S. 1025 (1969). In other words, mining claims which were filed before 1955 and for which a valid mineral discovery could be established were not subject to the act.

Plaintiffs and their predecessors in interest submitted a verified statement for the Deep Diggins and High Bar placer mining claims to the BLM on July 17, 1964. The statement asserted that they claimed

> right, title and interest in the vegetative surface resources and other surface resources under such mining claims hereafter described which are contrary to and in conflict with the limitations and restrictions specified in section 4 (69 Stat. 367) as to the mining claims hereinbelow described.

A notice of hearing issued on June 22,

1966, in which the BLM contested plaintiffs' claim asserting that "a discovery of valuable minerals has not been made within the limits of any of the unpatented mining claims." Following a mineral report dated August 18, 1966, recommending that the claimants' verified statement be accepted, the BLM conceded that a claim had been filed prior to July 23, 1955, and that valuable minerals had been discovered. The hearing examiner then dismissed the proceedings.

Plaintiffs contend that the above resolution of Contest Number Oregon 014538-A dated Septemebr 13, 1966, which is headed "Final Decision On Closing Determination Area", recognizes and accepts plaintiffs' rights and claims to the vegetative surface resources and other resources upon said mining claims, and that defendants are estopped to deny plaintiffs' right to such resources in these proceedings.

However, section 7 of the act (69 Stat.

372) (codified at 30 U.S.C. § 615 (1976)) provides that:

> Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim hereintofore located except as such rights may be limited or restricted as a result of a proceeding pursuant to section 5 of this Act, or as a result of a waiver and relinquishment pursuant to section 6 of this Act; and nothing in this Act shall be construed in any manner to authorize inclusion in any patent hereafter issued under the mining laws of the United States for any mining claim heretofore or hereafter located of any reservation, limitation or restriction not otherwise authorized by law, or to limit or repeal any existing authority to include any reservation, limitation or restriction in any such patent, or to limit or restrict any use of the lands covered by any patented or unpatented mining claim by the United States, its lessees, permittees and licensees which is otherwise authorized by law.

The BLM interprets this provision to preserve all rights to a mining claim located prior to the act that existed on the date of the act, unless the claimant fails to file a verified statement or it is determined pursuant to a hearing that the

rights asserted in a verified statement are not valid or the claimant waives his right. 43 CFR 3714.3; 43 CFR 185.137 (1964). The BLM has also concluded that although section 7:

> preserves to all mining claimants the right to a patent unrestricted by anything in the Act and provides that no limitation, reservation or restriction may be inserted in any mineral patent unless authorized by law ... it also makes it clear that all laws enforced on the date of its enactment which provide for any such reservation, limitation or restriction in such patents and all authority of law then existing for the use of lands embraced in unpatented mining claims by the United States, its lessees, permittees and licensees continue in full force and effect. 43 CFR 3714.3; 43 CFR 185.137 (a) (1964).

Thus, the resolution of Contest Number Oregon 014538-A did not give plaintiffs any rights but merely recognized that the 1955 Act did not deprive plaintiffs of any right they had theretofore possessed. The effect of the decision was to recognize the rights to surface resources that plaintiffs held on July 23, 1955. Those rights are defined

by the acts of June 9, 1916, and April 8, 1948, which require the government to reserve timber rights to the United States.

I find that the elements of estoppel are not present in this case and that defendants are not estopped from denying plaintiffs' right to the timber resources they are herein asserting.

VI

It is not disputed, nor can it be, that the United Staes did issue a patent to the railroad on December 4, 1895, for a number of tracts of land including section 19, in which plaintiff's mineral entries are located (Railroad Grant #13). Plaintiffs contend that because the language of the Act of July, 1866, which authorized the issuance of a patent to the O & C railroad excluded all "mineral lands, should they be found to exist in the tracts", the subject lands were not included in the patent to the railroad because of existing recorded

mineral claims. However, the issuance of a patent under the Railroad Land Grant acts is determinative of the non-mineral character of the grant. Therefore, once a patent issued, the railroad company held full and complete title until it was revested in the United States. See Central Pacific Railroad Company v. Valentine, 11 L.D. 238 (1890); Barden v. Northern Pacific Railroad Company, 154 U.S. 288 (1894) at 329 through 332, and Northern Pacific Railroad Company, 32 L.D. 342 (1903).

The fact that a mining claim may have been filed in section 19 by other persons prior to the issuance of a patent to the railroad does not establish that the land was mineral in character. Many mining claims are filed that are subsequently declared invalid. At the time the patent was issued to the railroad, the land department had to make a decision whether the land was mineral. The appropriate officers apparently

determined that section 19 was non-mineral and that it should be patented to the railroad. As noted above, once a patent issued, the railroad company held full and complete title until revestment. Plaintiffs have no standing to attack the patent to the railroad in 1895 because they do not claim to have acquired any interest in the mining claims in section 19 prior to the patent to the railroad.

In Burke v. Southern Pacific Railroad, 234 U.S. 669 (1914), the United States Supreme Court concluded that the general land office was without authority to issue patents excepting mineral land because the granting act contemplated that only non-mineral lands would be patented and that the patents would unconditionally pass title. Based on the cases cited above, I find as a matter of law that once a patent was issued, the railroad company held full and complete title to the lands. The min-

eral rights were not reserved to the United States because mineral lands could not be included in the railroad grant.

Plaintiffs contend that the decision of Judge Wolverton of this court in United States v. Oregon & California Railroad Company, et al., 8 F.2d 65 (D.Or. 1925) and the final decree entered on April 28, 1926, "specifically found that the land subject to these proceedings were not revested O & C lands" being "expressly excluded" by said decree and that the decree is a bar to the contentions now raised by defendants.

Section 7 of the Act of June 9, 1916 (39 Stat. 218), provided for legal proceedings to determine the exact acreage which the railroad was entitled to keep and the amount due the railroad under the instructions previously given by the Supreme Court. The proceeding contemplated by Section 7 of the act was filed in 1917, and continued for approximately eight years.

In a final decree entered April 28, 1926, the court identified those lands to which the railroad was entitled under the primary grant and indemnity grants, made provision for payment, and quieted title to certain lands in the United States. These are the lands which revested to the United States under the Act of June 9, 1916. The court held that the railroad company was not entitled to compensation for certain areas within the primary limits of the grants, including 1,959,122.83 acres which were excepted from the grants on account of mineral character or the attachment of adverse rights prior to the grants, and 1,365.03 acres which were patented to the railroad but were embraced in valid entries prior to the location of the railroad line.

Plaintiffs contend that:

> there can be no question but that section 19, township 29 south, range 7 west, including the lands owned by plaintiffs which are the subject of these proceedings, were the subject of four prima facia valid entries made by

parties at the time the definite location of the railroad lines were fixed.

Plaintiffs further contend that:

> these lands being excepted from the grant and excluded therefrom for the reasons given by the court are not lands such as revested under the Act of June 19, 1916.

However, I find that section 19 was not one of the tracts to which the court had referenced when it noted in paragraphs (k) and (m):

> (k) That 1,365.03 acres were patented to the railroad company but were embraced in prima facia valid entries at the time of the definite location of the railroad line was fixed.
>
> ...
>
> (m) That the remaining 1,959,122.83 acres were excepted from the grants on account of mineral character, and attachment of adverse rights prior to the grants.

One of the mining claims which plaintiffs contend should be considered as establishing the mineral nature of this section was located in 1865. There is no evidence whether it was maintained or abandoned in subsequent years. The other three mining

claims cited by plaintiffs were located in 1881 and 1894, long after the railroad was constructed. In the Roseburg, Oregon area, construction of the railroad line was completed in 1871 and maps showing the location of the line were filed with the United States by 1871 (see Agreed Statements of Facts, case no. 76-99). There was therefore, at most, only one mining claim in existence at the time the definite location of the railroad was fixed. Nothing in the record before the court indicates its history. My review is confined to the agency record or such portions of it that the parties may cite. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1978); U.S. v. Smith Christian Mining Enterprise, 537 F.Supp. 57 (D.Or. 1981).

Moreover, title to section 19 was specifically identified in the court's decree. See Exhibits A and B to the court's final decree, the schedule particularly describing the lands granted to the railroad under

the acts of 1866, 1869 and 1870, title to which was by the decree of court "quieted and confirmed in the plaintiff" (United States). Thus, contrary to plaintiffs' contention that the subject lands were generally excluded from the original patents, I find that they were, by the court's decree, specifically identified as being O & C land, title to which revested in the United States.

VII

The parties agree that except with regard to the Oro Grande claim, all of the mining claims here at issue were located after 1916, when the lands were opened to entry under the revestment act, and prior to the effective date of the 1948 Act, which was August 28, 1937.

Plaintiffs contend that even if section 19 is O & C land, the Oro Grande claim was located June 3, 1916, which is prior to June 9, 1916, the date of the revestment

act in which Congress declared the title to certain lands which had been granted to the railroad revested in the United States and the land became open to entry for mineral location. Defendants contend that the Oro Grande claim has an effective location date of July 19, 1938.

The record reflects that the Oro Grande claim is a relocation of the Van Gunde claim which was located on June 3, 1916. However, the record reflects that the land was still patented to the O & C railroad on June 3, 1916, and was not open to the filing of mineral claims under federal law, and thus, any purported claims are null and void. The Oro Grande claim was relocated on July 19, 1938, and I find that July 19, 1938, is the effective date of location. Therefore, the 20 acres of land in the High Bar claim, covering the Oro Grande claim, are governed by the provisions of the Act of April 8, 1948.

Plaintiffs' reliance on Noonan v. Caledonia Mining Company, 212 U.S. 393 (1887) is misplaced. That case has been limited to its facts and has no application to this proceeding.

VIII

CONCLUSION:

The decision of the Administrative Law Judge is binding upon the court if upon a review of the entire record the decision is supported by substantial evidence. Henrikson v. Udahl, 350 F.2d 949 (9th Cir. 1976). I find from a review of the entire record that the decision of Administrative Law Judge Erwin [sic] in IBLA 83-992 is supported by substantial evidence and that the reservation by the Department of Interior of timber and associated rights in patent number 36-83-003 [sic] is proper. I find further that there are no disputed facts determinative of the legal issues in this case, and that defendants are entitled

to judgment as a matter of law. Accordingly, plaintiffs' motion for summary judgment (#7) should be denied. Defendants' motion for summary judgment (#11) should be granted.

DATED this 21st day of August, 1985.

/S/ Michael R. Hogan
UNITED STATES MAGISTRATE

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

4015 Wilson Boulevard
Arlington, Virginia 22203

JOSEPH A. BARNES, ET AL.

IBLA 83-992 Decided December 13, 1983

Appeal from the decision of the Oregon State Office, Bureau of Land Management, denying a protest against patent 36-83-0013.

Affirmed.

1. Mining Claims: Patent

The Bureau of Land Management properly determines the acreage of mining claims that have been conformed to surveyed legal subdivision of the township by reference to its official land status records.

2. Patents of Public Lands: Reservations--Railroad Grant Lands

Language in a patent of railroad grant lands that excludes mineral lands does not operate as a mineral reservation or diminish the estate vested in the grantee upon discovery of minerals in the land. The issuance of a railroad grant lands

patent generally constitutes a conclusive determination by the United States of the nonmineral character of the land.

3. Mining Claims: Surface Uses-- Surface Resources Act: Verified Statement

Acceptance by the Bureau of Land Management of mining claimant's verified statement under section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1976), confirms only those rights to surface resources that the claimants held on July 23, 1955, as defined or limited by other existing law.

4. Mining Claims: Patent--Mining Claims: Surface Uses--Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Mining Claims

The Bureau of Land Management properly reserves to the United States in a mineral patent for O & C revested grant lands the timber now on a mining claim subject to the Act of June 9, 1916, 30 Stat. 218, and the timber now or hereafter growing on a mining claim subject to the Act of Apr. 8, 1948, 62 Stat. 162.

5. Administrative Authority: Generally--Constitutional Law: Generally--Statutes

The Department of the Interior, as an agency of the executive branch

> of the Government, is not the proper forum to decide whether a statute enacted by Congress is unconstitutional.

APPEARANCES: Edward Ray Fechtel, Esq., Eugene, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On June 15, 1983, the Oregon State Office, Bureau of Land Management (BLM), issued mineral patent No. 36-83-0013 to Joseph A. Barnes, Lucille N. Barnes, Peter J. Nemec, Agnes C. Nemec, and Clarence H. Berg for the Deep Diggings and High Bar placer mining claims encompassing 114.22 acres of land described as lots 9, 15, 18, 19, and 22, sec. 19, T. 29 S., R. 7 W., Willamette meridian, Oregon. The patent was issued subject to certian conditions, not at issue before this Board, and reserved to the United States a right-of-way for ditches and canals, also not at issue, and the following contested timber rights:

> 2. Under authority of Section 3 of the Act of June 9, 1916 (39 Stat. 218) the timber now on Lots 9, 15, 18, and

22 of the described land, excepting and excluding that 20-acre portion of the High Bar association placer covering the Oro Grande placer mining claim located July 19, 1938, and recorded July 23, 1938, in Book 11 at Page 135, Mining Records of Douglas County, Oregon, together with the right of the purchaser of the timber to enter upon the land and to cut and remove the timber;

3. The timber now or hereafter growing on that 20-acre portion of the High Bar association placer covering the Oro Grande placer mining cliam located July 19, 1938, and recorded July 23, 1938, in Book 11 at Page 135, Mining Records of Douglas County, Oregon, together with the right to manage and dispose of the timber as provided by law, in accordance with and subject to the provisions of the Act of April 8, 1948 (62 Stat. 162);

On August 8, 1983, the patentees protested against the form in which the BLM issued the patent, complaining that they are entitled to 121 acres of land and that because they have a vested right to the surface resources of the lands granted, the reservation to the United States of the timber reserves was improper. BLM denied the protest by decision dated August 17, 1983. The patentees thereafter filed a

timely notice of appeal of BLM's decision to this Board and submitted a copy of their original protest letter as their statement of reasons.

As noted, appellants first complain that they are entitled to 121 acres, not 114.22 acres, of land by virtue of their application and payment for 121 acres. BLM responded that the actual acreage which their patent application encompassed was only 114.22 acres in accordance with appellant's notices of amended locations, dated January 27, 1964, for the two mining claims.1/ BLM noted that a $15 overpayment was being processed for return to appellants.

(1) Appellants' patent application, OR 26402, initially submitted to BLM on April 14, 1981, identified the Deep Dig-

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1/ The notices of amended locations were filed to conform the claims' land descriptions to the amended lottings of the supplemental plat of survey for sec. 19, T. 29 S., R. 7 W., Willamette meridian.

gings claim as "60 acres, more or less" described as lots 15 and 22, sec. 19, T. 29 S., R. 7 W., Willamette meridian, and the High Bar claim as "70 acres, more or less" described as lots 9, 18, 19, and 23, sec. 19, T. 29 S., R. 7 W., Willamette meridian. Thus appellants' application seemed to encompass approximately 130 acres of land in section 19.

Review of the master title plat for T. 29 S., R. 7 W., Willamette meridian, reveals however, that the actual surveyed acreage for lots 15 and 22 is 38.35 acres and 19.43 acres, respectively, or a total of 57.78 acres for the Deep Diggings claim. The actual acreage for the High Bar claim is Lot 9, 37.72 acres; lot 18, 9.27 acres; lot 19, 9.45 acres; and lot 23, 9.57 acres, or a total of 66.01 acres. Therefore, the two claims as described in appellants' patent application actually encompassed 123.79 acres, not 130 acres.

By letter dated December 22, 1982, BLM informed appellants that its mineral examiners had concluded that lot 23, 9.57 acres of the High Bar claim, was nonmineral in character. See Mineral Report, dated August 27, 1982, and approved December 2, 1982, at 16. BLM indicated that appellants could withdraw their application as to lot 23 or BLM would institute contest proceedings against that portion of the claim. By a statement dated February 3, 1983, appellants withdrew their applicaiton as to lot 23, leaving the High Bar claim at 56.44 acres and the total acres for the two claims at 114.22.

Accordingly, we find that BLM issued patent No. 36-83-0013 for the proper acreage. It appears that appellants' acreage figure was calculated based on the subdivision of sec. 19 as a regular 640-acre section which it is not. See Exh. B, Mineral Patent Application OR 26402.

Appellants' second complaint is against the reservation of the timber on the lands and related rights to the United States. Appellants argue first that the lands are not Oregon and California Railroad (O & C) revested grant lands subject to the Act of June 9, 1916, 39 Stat. 218, because they are mineral lands. Appellants point out that section 2 of the Act of July 25, 1866, 14 Stat. 239, granted public land, "not mineral," to the railroad and that the patent issued to the railroad excluded "[a]ll mineral lands, should any be found to exist in the tracts described above." Appellants contend that ownership of sec. 19, T. 29 S., R. 7 W., Willamette meridian, should be considered never to have passed to the railroad because sec. 19 was mineral land as evidenced by mining claims that had been located there before 1866. Appellants conclude that the railroad agent's affidavit in support of a patent for sec. 19 had to

have been false and therefore sec. 19 was procured by fraudulent acts.

Appellants argue that the action of the Secretary of the Interior on February 25, 1920, to classify the lands at issue as class 2 timberlands under section 2 of the Act of June 9, 1916, 39 Stat. 219, was arbitrary and capricious and in excess of the authority granted him because the lands should have been excluded from the railroad grant as mineral lands in the first place or, alternatively, if the lands were within the purview of the 1916 Act, the Secretary failed to determine the amount of timber growing on the lands as required by the Act. Appellants assert that the portion of sec. 19 at issue had less than 300,000 board feet of merchantable timber on each 40-acre tract.2/

2/ Class 2 was defined as "Timberlands, which shall include lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision." 39 Stat. 219.

Appellants urge that the Act of April 8, 1948, 62 Stat. 162, superseded the 1916 Act regarding the rights of mineral entryman to the surface resources of revested O & C lands. They contend that it validated all mineral claims located on revested O & C lands, if otherwise valid, and restricted the rights to surface resources of only those claims located after August 28, 1937. Appellants state that all of the claims at issue were located prior to that date and note particularly that the Oro Grande placer mining claim was located on June 3, 1916, not in 1938.

Appellants also claim that the United States is estopped to deny their rights to surface resources by virtue of BLM's September 13, 1966, decision in contest Oregon 014-538-A undertaken pursuant to section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1976). Appellants argue that their rights to surface resources on the lands

were adjudicated and accepted by BLM in that proceeding.

In its August 17, 1983, decision, BLM responded to each of appellants' arguments but found them unpersuasive.

It is helpful to set out the history of the O & C lands before addressing appellants' arguments. By Act of July 25, 1866, 14 Stat. 239, and Act of May 4, 1870, 16 Stat. 94, Congress granted to the California and Oregon Railroad Company certain lands to aid in the construction of the railroad through Oregon. By the Act of June 9, 1916, 39 Stat. 218, Congress declared revested in the United States certain of the lands which had been granted to the railroad. Section 2 of the Act provided that the various lands would be classified as powersite lands, timberlands, or agricultural lands. Section 3 of this Act provided that the lands revested, except for lands classified for powersite purposes,

would be open to exploration, entry, and disposition under the general mining laws if they were chiefly valuable for the mineral deposits contained therein. Section 3 also provided, however, that "any person entering mineral lands of class two shall not acquire title to the timber thereon, which shall be sold as hereinafter provided * * * but he shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is sold by the United States." 39 Stat. 219.

Subsequently, Congress adopted the Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. §§ 1181a through 1181f (1976), which provided generally that O & C lands under the jurisdiction of the Department of the Interior that were classified as timberlands should be managed for permanent forest production and that the timber should be cut

and sold in conformity with the principle of sustained yield. The Department interpreted the Act as partially repealing section 3 of the Act of June 9, 1916, in effect, so that lands classified as valuable for timber were deemed no longer open to mineral location or leasing. See Applicability of Mining Laws to Revested Oregon and California and Reconveyed Coos Bay Grant Lands, 57 I.D. 365 (1941).

Then Congress passed the Act of April 8, 1948, 62 Stat. 162, that provided:

> [N]otwithstanding any provisions of the Act of August 28, 1937 (50 Stat. 874), or any other Act relating to the Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, all of such revested or reconveyed lands, except power sites, shall be open for exploration, location, entry, and disposition under the mineral-land laws of the United States, and all mineral claims heretofore located upon said lands, if otherwise valid under the mineral-land laws of the United States, are hereby declared valid to the same extent as if such lands had remained open to exploration, location, entry, and disposition under such laws from August 28, 1937, to the date of enactment of this Act: Provided, That any person who under such laws has en-

> tered since August 28, 1937, or shall hereafter enter, any of said lands, shall not acquire title, possessory or otherwise, to the timber, now or hereafter growing thereon, which timber may be managed and disposed of as is or may be provided by law, except that such person shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is disposed of by the United States: Provided further, That locations made prior to August 28,1937, may be perfected in accordance with the laws under which initiated.

Thus, Congress restored revested O & C lands to mineral location except that a locator of a mining claim could not acquire title to the timber "now or hereafter growing thereon."

The first issue for us to address is whether sec. 19, T. 29 S., R. 7 W., Willamette meridian, was patented to the railroad.

The mineral lands exception in the railroad grant acts was the subject of a number of early Supreme Court and Departmental decisions. In Central Pacific R.R. v. Valentine, 11 L.D. 238 (1890), Secretary

Noble ruled that discovery of the mineral character of land at any time prior to the issuance of the patent for it required exclusion of the land from any railroad grant which contains a provision excepting all mineral lands. This was in contest to determining the status of the land for other purposes on the date that the route of the railroad line was definitely fixed. This construction was upheld in Barden v. Northern Pacific Railroad, 154 U.S. 288, 329-32 (1894). The Supreme Court also recognized in that case, however, that although the land office may not have always made the proper characterization of the lands involved in railroad grants, issuance of a patent was conclusive as to the status of the land absent direct proceedings voiding the patent. It noted:

> "It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the

> government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. *** The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title.

154 U.S. at 330.

Until 1903, patents issued under the railroad grant acts in most instances contained language excepting mineral lands. Since this language might have been construed as allowing the Federal Government to reclaim lands for which patent had issued if they later were found to contain mineral reserves, a railroad company requested that the Secretary of the Interior eliminate

the excepting language from its patents. The Secretary reviewed pertinent decisions of the Supreme Court and concluded that the issuance of a patent under the railroad land grant acts is determinative of the nonmineral character of the lands for the purposes of the grant. Northern Pacific Railway, 32 L.D. 342, 344 (1903). The Secretary concluded with a directive to the General Land Office to exclude language from future railroad land grant patents.

The Supreme Court subsequently reviewed the same issue in Burke v. Southern Pacific R.R., 234 U.S. 669 (1914). The court concluded that the General Land Office was without authority to issue patents with language excepting mineral lands because the granting Act contemplated that only nonmineral lands would be patented and that the patents would unconditionally pass title. The court stated as well that

> a bill in equity, on the part of the Government, [may] lie to annul the

> patent and regain title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill ***; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it.

234 U.S. at 692.

[2] In summary, once patents issued, the railroad company held full and complete title to the lands. The minerals were not reserved to the United States because mineral lands could not be included in a railroad grant. Furthermore, such patents cannot now be attacked by persons in appellants' circumstances because, as we shall see, appellants had no interest in the lands at the time the patent issued. George Antunovich, 76 IBLA 301,90 I.D. 464 (1983); Diane B. Katz, 48 IBLA 118 (1980).

[3,4] With the exception of the Oro Grande claim, appellants and BLM agree that the claims on which this patent is based were located after 1916 when the lands were

opened to entry under the 1916 Act. As to the Oro Grande claim, BLM found that it has an effective location date of July 19, 1938. Appellants assert that it was located on June 3, 1916. The record shows, as BLM found, that the Oro Grande claim is a relocation of the original Van Gundy claim. That claim was located on June 3, 1916, and consequently was null and void ab initio because on that date the land was still patented to the railroad without a reservation of the minerals. John Roberts, 55 I.D. 430 (1935). Thus, the 20 acres of land in the High Bar claim covering the Oro Grande claim are governed by the provisions of the Act of April 8, 1948, because its effective location date is 1938.

As previously noted, contest No. Oregon 014538-A against the mining claims at issue was undertaken pursuant to the Act of July 23, 1955, which was enacted to provide for the multiple use of the surface of the pub-

lic lands among other purposes. 43 CFR 3710.0-3; 43 CFR 185.120 (1964). Section 4 of that Act, 30 U.S.C. § 612 (1976), provides that any mining claim "hereafter located" shall not be used, prior to the issuance of patent, for purposes other than mining and reserves to the United States the right to manage and dispose of the surface resources of such claim. See CFR 3712.1. Section 5, U.S.C. § 613 (1976), provides a procedure for determining whether mining claims located prior to the date of the Act, July 23, 1955, would be subject to the provisions of section 4. In brief, the procedure provides that the head of a Federal agency responsible for administering the surface resources of lands belonging to the United States may institute proceedings leading to a determination of surface rights by filing with the Secretary of the Interior a request for publication of notice to mining claimants. A

mining claimant asserting a right to surface resources must then file a verified statement detailing certain information as to the claim. Failure to file the statement within the required time constitutes the waiver and relinquishment of any right, title, or interest under the mining claim contrary to or in conflict with the limitations and restrictions specified in section 4 of the Act. See 43 CFR 3712.2 through 3712.3. If a verified statement is filed, the Secretary of the Interior must then schedule a hearing to determine the validity and effectiveness of any right, title, or interest under the mining claim asserted by the mining claimant. See 43 CFR 3713.2. In order to establish any right to the surface resources, or, in other words, the inapplicability of section 4, a mining claimant must prove that he made a discovery on his claim within the meaning of the mining laws prior to July

23, 1955. United States v. Payne, 68 I.D. 250 (1961).

Joseph A. Barnes, Julia R. Fisher, and Harvey A. Reed3/ submitted a verified statement for the Deep Diggings and High Bar placer mining claims to BLM on July 17, 1964. The statement asserted that they claimed "right, title, and interest in the vegetative surface resources and other surface resources under such mining claims as hereinafter described which are contrary to and in conflict with the limitations and restrictions specified in Section 4, 69 Stat. 367, as to the mining claims hereinbelow described." A notice of hearing issued on June 22, 1966, in which BLM asserted that "[a] discovery of valuable minerals has not been made within the limits

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3/ Julia R. Fisher bequeathed her interest in the mining claims at issue to Harvey A. Reed, her son. Appellants acquired their interests in the claims by mesne conveyance from appellant Joseph Barnes and/or Harvey Reed. See Abstract of Title #12622, Douglas Abstract Co., Roseburg, Oregon.

of any of the unpatented mining claims." Following a mineral report dated August 18, 1966, recommending that the claimant's verified statement be accepted, BLM recognized the rights of the claimants and reported such to the hearing examiner, who then dismissed the proceedings undertaken pursuant to section 5 of the Act of July 23, 1955. Decision on contest No. Oregon 014538-A, dated September 13, 1966; Final Decision on Closing Determination Area, Oregon 014538, dated December 19, 1966, amended January 13, 1981.

Nevertheless, section 7 of the Act, 69 Stat. 372 (codified at 30 U.S.C. § 615 (1976), provides that:

> Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located, except as such rights may be limited or restricted as a result of a waiver and relinquishment pursuant to section 6 of this Act; and nothing in this Act shall be construed in any manner to authorize inclusion in any patent hereafter issued under

> the mining laws of the United States for any mining claim heretofore or hereafter located, of any reservation, limitation, or restriction not otherwise authorized by law, or to restrict any use of the lands covered by any patented or unpatented mining claim by the United States, its lessees, permittees, and licensees which is otherwise authorized by law.

BLM has consistently interpreted this provision to preserve all rights to a mining claim located prior to the Act that exists on the date of the Act, unless the claimant fails to file a verified statement, or it is determined pursuant to a hearing that the rights asserted in a verified statement are not valid, or the claimant waives his right. 43 CFR 3714.3; 43 CFR 185.137 (1964). BLM has also concluded that although section 7

> preserves to all mining claimants the right to a patent unrestricted by anything in the Act and provides that no limitation, reservation or restriction may be inserted in any mineral patent unless authorized by law,* * * it also makes it clear that all laws in force on the date of its enactment which provide for any such reservation, limitation or restriction in such patents and all authority of law then existing

> for the use of lands embraced in unpatented mining claims by the United States, its lessees, permittees, and licensees continue in full force and effect. [Emphasis added.]

43 CFR 3714.3; 43 CFR 185.137(a) (1964).

Accordingly, the effect of the proceedings pursuant to section 5 of the Act of July 23, 1955, in this case was to recognize only the rights to surface resources that appellants held on July 23, 1955. Those rights are defined by the Acts of June 9, 1916, and April 8, 1948. Thus, the reservations of timber and associated rights in patent No. 36-83-0013 are proper.

[5] In conclusion we note that appellants have also argued that the Acts of June 9, 1916, and April 8, 1948, are unconstitutional as written and applied in this case. They assert that they have been denied equal protection as provided by the United States Constitution because others with "similar vested interests" have been granted unrestricted patents. They also

contend that their property has been taken for public use in violation of the Fifth Amendment to the Constitution. As BLM noted in its decision, the Department of the Interior, as an agency of the executive branch of Government, is not the proper forum to decide whether or not a statute enacted by Congress is constitutional. Tesoro Petroleum Corp., 65 IBLA 99 (1982); United States v. Imperial Gold, Inc., 64 IBLA 241 (1982).

However, even if BLM has improperly issued patents without timber reservations to others in exactly the same circumstances as appellant, that is not a sufficient reason for BLM to continue to do so. See George Brennan, Jr., 1 IBLA 4 (1970). The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers. Rachalk Production, Inc., 71 IBLA 374 (1983);

Kenneth F. Cummings, 62 IBLA 206 (1982); 43 CFR 1810.3(a). Insofar as appellants' Fifth Amendment due process rights are concerned, due process does not require notice and a prior hearing in every case that an individual is deprived of property as the individual is given notice and an opportunity to be heard before the deprivation is final. As we have often stated, even if due process did require the Department of the Interior to afford appellants some form of hearing, the requirement is satisfied by appeal to this Board. Robert J. King, 72 IBLA 75 (1983); H. B. Webb, 34 IBLA 362 (1978).

Appellants have requested that a fact-finding hearing be held in this case. Such hearings may be ordered at the discretion of the Board under 43 CFR 4.415. A hearing is necessary only where there are disputed issues of fact determinative of the legal issues on appeal which require resolution through the introduction of testimony and

other evidence. See United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971). Appellants' request for a hearing is denied because there are no disputed facts controlling the outcome of this appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Oregon State Office is affirmed.

/S/ William A. Irwin
William A. Irwin
Administrative Judge

We concur:

/S/ Douglas E. Henriques
Douglas E. Henriques
Administrative Judge

/S/ Edward W. Stuebing
Edward W. Stuebing
Administrative Judge

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Office of the Hearing Examiners
P.O. Box 21-4215
Sacramento, California

September 13, 1966

DECISION

United States of America,	:	Contest No.
	:	014538-A
v.	:	(P.L. 167),
	:	Involving the
Joseph A. Barnes,	:	Deep Diggings
Harvey A. Reed,	:	and High Bar
Donald Reed, Executor of	:	Placer Mining
the Estate of Julia R.	:	Claims, Embra-
Fisher, deceased,	:	ced within
Mining Claimants	:	Sec. 19, T.29
	:	S., R. 7 W.,
In the Matter of the	:	W.M., Douglas
Determination of Surface	:	County,Oregon
Rights on Certain Un-	:	
patented Lands of the	:	
United States	:	

PROCEEDING DISMISSED
HEARING CANCELLED

By notice of June 22, 1966, the parties herein named were directed to appear at a hearing in the above entitled matter before a Hearing Examiner on August 19, 1966, in Roseburg, Oregon.

On August 18, 1966, the Land office, Bureau of Land Management, Portland, Oregon, advised that it has accepted the rights claimed and asserted by the mining claimants and requested that the hearing be cancelled.

Since the Bureau of Land Management has recognized and accepted the rights claimed and asserted by the mining claimants, a hearing pursuant to Section 5(c) of the Act of July 23, 1955, (69 Stat. 367), will not be held as to the above-identified and described unpatented mining claim.

As to the Deep Diggings and High Bar Placer Mining Claims, embraced within Sec. 19, T. 29 S., R. 7 W., W. M., Oregon, the proceedings brought by the Bureau of Land Management pursuant to Section 5 of the Act of July 23, 1955, supra, are closed. A copy of this decision will be filed in the Land Office, Bureau of Land Management, at Port-

land, Oregon.

/S/ Paul A. Shepard
Paul A. Shepard
Hearing Examiner

[Distribution listing omitted]

UNITED STATES

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Office of the Hearing Examiner
P.O. Box 21-4215
Sacramento, California

June 22, 1966

NOTICE OF HEARING

United States of America,	: Contest No. 014538-A
v.	: (P.L. 167)
	: Involving the
Joseph A. Barnes,	: Deep Diggings
Harvey A. Reed,	: and High Bar
Donald Reed, Executor of	: Placer Mining
the Estate of Julia R.	: Claims, Em-
Fisher, deceased,	: braced within
Mining Claimants	: Sec. 19, T.29
	: S. R. 7 W.,
In the Matter of Determin-	: W.M., Douglas
ation of Surface Rights on	: County,Oregon
Certain Unpatented Lands	:
of the United States	:

In the proceeding brought pursuant to Section 5 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 611-615), at the request of the Bureau of Land Management, the above named mining claimants filed a verified statement claiming rights contrary to or in conflict with the limitations or re-

strictions specified in Section 4 of the said Act, under and by virtue of the above-identified mining claims. Thereafter, the Bureau of Land Management filed with the Hearing Examiner a request that a hearing as to such unpatented claims be held pursuant to Section 5(c) of the Act. Accordingly, the parties named above are notified as follows:

1. NOTICE TO APPEAR

The parties herein named are directed to appear at a hearing before a Hearing Examiner on August 19, 1966, commencing at 9:00 a.m., in Room 216, Douglas County Courthouse, Roseburg, Oregon.

2. NATURE OF THE PROCEEDING

The hearing will be held for the purpose of receiving oral testimony, under oath, and documentary evidence, bearing upon any and all material isues in the above-entitled

matter.

3. MATTERS ASSERTED

As to the unpatented mining claims identified herein, the United States Bureau of Land Management asserts, and at the hearing will offer evidence to prove that:

1. A discovery of valuable mineral has not been made within the limits of any of the unpatented mining claims listed above.

4. LEGAL AUTHORITY AND JURISDICTION

The hearing herein ordered will be held under the authority and pursuant to the following:

Section 5(c) of the Act of July 23, 1955 (69 Stat 367).

Regulations of the Department of the Interior, 43 CFR 3513.1 to 3513.3, inclusive.

Regulations of the Department of the Interior, 43 CFR Part 1850, 29 FR 4329, March 31, 1964.

5. FEES - ATTORNEYS AND WITNESSES

Each party must pay the fees and other charges of its attorneys, and the attendance fees and other costs of any witnesses who, at the parties request, appear at the hearing or at the taking of any deposition.

6. TRANSCRIPT OF PROCEEDING AND REPORTER'S FEES

A verbatim stenographic record of the hearing will be made. To cover the proportionate share of the reporter's fees, the mining claimants will be required to make a deposit in the amount of $100.00 at the time of the hearing and such additional deposits as may be required by the Hearing Examiner in the course of the proceeding. (See Section 1852.3-7 of the enclosed Circular 2164 and information sheet for instructions and information regarding reporter's fees).

/S/Paul A. Shepard
Paul A. Shepard
Hearing Examiner

STATUTES INVOLVED

30 U.S.C. § 612 (Unpatented mining claims), 69 Stat. 368, (Section 4 of the Act of July 23, 1955), provides:

> (a) Prospecting, mining, or processing operations. Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
>
> (b) Reservations in the United States to use of the surface and surface resources. Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface re-

sources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use of so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is avail-

able to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership control, appropriation, use, and dis-

tribution of ground or surface waters within any unpatented mining claim.

(c) Severance or removal of timber. Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith,or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under the preceeding subsection (b). Any severance or removal of timber which is

> permitted under the exceptions of the preceeding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management. (July 23, 1955, ch. 375, § 4, 69 Stat. 368)."

30 U.S.C. § 613 (Procedure for determining title uncertainties), 69 Stat. 369 (Section 5 of the Act of July 23, 1955), provides :

> (a) Notice to mining claimants; request; publication; service. The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of

notice to mining claimants, for determination of surface rights,which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to

ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's, abstractor's or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. 'Tract indexes' as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal

subdivision of the public land surveys, and as to unsurveyed lands, identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of,any unpatented mining claim heretofore located, rights as to such

lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred fifty days from the date of the first publication of such notice(which date shall be specified in such notice) a verified statement which shall set forth as to such unpatented mining claim--

(1) the date of location;

(2) the book and page of recordation of notice or certificate of location;

(3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such

lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such locations; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to consitute a waiver and relinquishment by such mining claimant of any right title or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of this Act [30 USCS § 612] as to hereafter located unpatented mining

claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor shall be subject to the limitations and restrictions specified in section 4 of this Act [30 USCS § 612] as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of this Act [30 USCS § 612] as to hereafter located patented mining claims.

If such notice is published in a daily paper, it shall be published in the Wednesday issue for nine con-

secutive weeks, or, if in a weekly paper, in nine consecutive issues, or if in a semiweekly or triweekly paper in the issue of the same day of each week for nine consecutive weeks.

Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail or by certified mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as aforesaid, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section 5, and shall cause a copy of

such notice to be mailed by registered mail or by certified mail to each person whose name and address is set forth in the title or abstract company's or title abstactor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed.

(b) Failure to file verified statement. If any claimant under any unpatented mining claim heretofore located which embraces any of the lands described in any notice pub-

lished in accordance with the provisions of subsection(a)of this section 5, shall fail to file a verified statement, as above provided, within one hundred and fifty days from the date of first publication of such notice, such failure shall be conclusively deemed, except as otherwise provided in subsection (e) of this section 5, (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of this Act [30 USCS § 612] as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim,prior to issuance of patent therefore,shall be subject to the limitations and

restrictions specified in section 4 of this Act [30 USCS § 612] as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of this Act [30 USCS § 612] as to hereafter located unpatented mining claims.

(c) Hearings. If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section 5, then the Secretary of the Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or

interest in or under such mining claim which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 4 of this Act [30 USCS § 612] as to hereafter located patented mining claims, which place of hearing shall be in the county where the lands in question or parties thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearing[s] shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the

conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim, then no subsequent proceedings under this section 5 of this Act shall have any force or effect upon the so-affirmed right or interest of such mining claimant under such mining claim. If at any time prior to a hearing the department or agency requesting publication of notice and any person filing a verified statement pursuant to such notice shall so

stipulate,then to the extent so stipulated, but only to such extent, no hearing shall be held with respect to rights asserted under that verified statement, and to the extent defined by the stipulation the rights asserted under that verified statement shall be deemed to be unaffected by that particular published notice.

(d) Request for copy of notice. Any person claiming any right under or by virtue of any unpatented mining claim heretofore located and desiring to receive a copy of any notice to mining claimants which may be published as above provided in subsection (a)of this section 5, and which may affect lands embraced in such mining claim, may cause to be filed for record in the county office of record where the notice or certificate of location of

such mining claim shall have been recorded, a duly acknowledged request for a copy of any such notice. Such request for copies shall set forth the name and address of the person requesting copies and shall also set forth as to each heretofore located unpatented mining claim under which such person asserts rights--

(1) the date of location;

(2) the book and page of the recordation of the notice or certificate of location; and

(3) the section or sections of the public land surveys which embrace such mining claim; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distance to an approved United States

mineral monument. "Other than in respect to the requirements of subsection (a) of this section 5 as to personal delivery or mailing of copies of notices and in respect to the provisions of subsection(e) of this section 5, no such request for copies of published notices and no statement or allegation in such request and no recordation thereof shall affect title to any mining claim or to any land or be deemed to constitute constructive notice to any person that the person requesting copies has, or claims, any right, title, or interest in or under any mining claim referred to in such request.

(e) Failure to deliver or mail copy of notice. If any department or agency requesting publication shall fail to comply with the requirements of sub-

section (a) of this section 5 as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice, or bar any rights of that person. (July 23, 1955, ch 375, § 5, 69 Stat. 369; June 11, 1960, P.L. 86-507, § 1(26), 74 Stat. 201).

30 U.S.C. § 614 (Waiver of Rights), 69 Stat. 372 (Section 6 of the Act of July 23, 1955), provides:

The owner or owners of any unpatented mining claim heretofore located may waive and relinquish all rights thereunder which are contrary to or in

conflict with the limitations or restrictions specified in section 4 of this Act [30 USCS § 612] as to hereafter located unpatented mining claims. The execution and acknowledgement of such a waiver and relinquishment by such owner or owners and the recordation thereof in the office where the notice or certificate of location of such mining claim is of record shall render such mining claim thereafter and prior to issuance of patent subject to the limitations and restrictions in section 4 of this Act [30 USCS § 612] in all respects as if said mining claim had been located after enactment of this Act [enacted July 23, 1955], but no such waiver or relinquishment shall be deemed in any manner to constitute any concession as to the date of priority of rights under said mining

claim or as to the validity thereof. (July 23, 1955, ch 375, § 6, 60 Stat. 372).

30 U.S.C. § 615 (Limitation of existing rights), 69 Stat. 372 (Section 7 of the Act of July 23, 1955), provides:

> Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located, except as such rights may be limited or restricted as a result of a proceeding pursuant to section 5 of this Act [30 USCS § 613], or as a result of a waiver and relinquishment pursuant to section 6 of this Act [30 USCS § 614]; and nothing in this Act shall be construed in any manner to authorize inclusion in any patent

hereafter issued under the mining laws of the United States for any mining claim heretofore or hereafter located, or any reservation, limitation, or restriction not otherwise authorized by law, or to limit or repeal any existing authority to include any reservation, limitation, or restriction in any such patent, or to limit or restrict any use of the lands covered by any patented or unpatented mining claim by the United States, its lessees, permittees, and licensees which is otherwise authorized by law. (July 23, 1955, ch 375, § 7, 69 Stat. 372).

43 U.S.C. § 1181a (of the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands), 50 Stat. 874(Section 1 of the Act of August 28, 1937), provides:

1181a. Conservation management by

Department of the Interior; permanent forest production; sale of timber; subdivision.

Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed, except as provided in section 3 hereof [43 USCS § 1181c], for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princi-

pal [principle] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities [facilities]: Provided, That nothing herein shall be construed to interfere with the use and development of power sites as may be authorized by law.

The annual productive capacity for such lands shall be determined and declared as promptly as possible after the passage of this Act [enacted August 28, 1937], but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: Provided, That

timber from said lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

If the Secretary of the Interior determines that such action will facilitate sustained-yield management, he may subdivide such revested lands into sustained yield forest units, the boundary lines of which shall be so established that a forest unit will provide, insofar as practicable, a permanent source of raw materials for the support of dependent communities and local industries of the region; but until such subdivision is made the land shall be treated as a

single unit in applying the principle of sustained yield: Provided, That before the boundary lines of such forest units are established, the Department, after published notice thereof, shall hold a hearing therein in the vicinity of such lands open to the attendance of State and local officers, representatives of dependent industries, residents, and other persons interested in the use of such lands. Due consideration shall be given to established lumbering operations in subdividing such lands when necessary to protect the economic stability of dependent communities. Timber sales from a forest unit shall be limited to the productive capacity of such unit and the Secretary is authorized, in his discretion, to reject any bids which may interfere with the sustained-yield management

plan of any unit. (August 28, 1937, ch 876, Title I, § 1, 50 Stat. 874).

43 U.S.C.§ 1181q(of the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands) 68 Stat. 270 (amendment to Act of August 28, 1937, 50 Stat. 874), provides;

1181q.Unselected and unpatented odd-numbered sections as revested grant lands; administration as national-forest lands; revenues; prohibition against disposition or exchange.

Those unselected and unpatented odd-numbered sections within the indemnity limits of the Oregon and California Railroad land grant authorized by the Act of July 25, 1866 (14 Stat. 239), as amended by the Act of April 10, 1869 (16 Stat. 47), and for which payment was made by the United States to such railroad or its successors in

interest under the Act of June 9,1916 (39 Stat. 218),pursuant to the decree in the case of United States against Oregon and California R. R. Co. (8 F. (2d) 645), which were included within the boundaries of national forests by proclamations of the President of the United States issued under the dates of June 17, 1892, September 28, 1893, October 5, 1906, January 25, 1907,March 1, 1907,and March 2, 1907, are hereby declared to be revested Oregon and California railroad grant lands; and said lands shall continue to be administered as national forest lands by the Secretary of Agriculture subject to all laws, rules, and regulations applicable to the national forests: Provided, That all revenues hereafter derived from said lands and those revenues heretofore derived from such lands and placed

in special deposit by agreement between the Secretary of Agriculture and the Secretary of the Interior shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended, and said lands shall not hereafter [after June 24, 1954] be subject to the provisions of any other laws or parts of laws which otherwise prescribe the disposal or distribution of receipts from lands of the United States, except that none of the provisions of this Act shall affect revenues heretofore [prior to June 24, 1954] distributed. No part of said lands or the resources thereof shall be subject to exchange under the provisions of this or any other law applicable to national-forest lands or otherwise. (June 24, 1954, ch 357, § 1(a),

68 Stat. 270.)"

The Act of April 8, 1948, 1-1948 U.S. Code Congressional Service, 62 Stat. 162, at pp. 169-170 provides in relevant part:

> ...[A]ll of such revested or reconveyed lands, except power sites, shall be open for exploration, location, entry, and disposition under the mineral-land laws of the Untied States, and all mineral claims heretofore located upon said lands if otherwise valid under the mineral-laws of the United States, are hereby declared valid to the same extent as if such lands had remained open to exploration, location, entry, and disposition under such laws from August 28, 1937, to the date of enactment of this this Act: Provided, That any person who under such laws has entered since August 28, 1937, or shall here-

after enter, any of said lands, shall not acquire title, possessory or otherwise,to the timber, now or hereafter growing thereon. ..."

The Revestment Act of 1916,137 Stat. at La. 218, provides in relevant part:

* * * * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to so much of the lands granted by the Act of July twenty-fifth, eighteen hundred and sixty-six, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon,' as amended by the Acts of eighteen hundred and sixty-eight and eighteen

hundred and sixty-nine, for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, and to so much of the lands granted by the Act of May fourth, eighteen hundred and seventy, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, as had not been sold by the Oregon and California Railroad Company prior to July first, nineteen hundred and thirteen, be, and the same is hereby, revested in the United States. ..." Id. at 218-219.

* * * * *

Sec. 3. That the classification provided for by the preceeding section shall not operate to exclude from exploration,entry,and disposition,under the mineral-land laws of the United States, any of said lands, except power sites, which are chiefly valuable for the mineral deposits contained therein, and the general mineral laws are hereby extended to all of said lands,except power sites: Provided, That any person entering mineral lands of class two shall not acquire title to the timber thereon, which shall be sold as hereinafter provided in section four,but he shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is sold by the United States." Id. at 219.

No. 87-525

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH A. BARNES, ET AL., PETITIONERS

v.

DONALD P. HODEL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Bureau of Land Management properly reserved timber rights to the United States in a mineral patent issued to petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 819 F.2d 250. The order of the district court (Pet. App. A14-A16) adopting the Magistrate's findings and recommendation (Pet. App. A17-A43) is unreported. The decision of the Interior Board of Land Appeals (Pet. App. A44-A71) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1987. The petition for a writ of certiorari was filed on September 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who were issued a mineral patent in 1983 (Pet. App. A46) based on claims located in the 1930s, con-

test the reservation to the United States of timber rights on the land encompassed by the patent.

In 1866 and 1870, Congress provided for land grants to the Oregon and California Railroad Company. Act of July 25, 1866, ch. 242, § 2, 14 Stat. 239-240; Act of May 4, 1870, ch. 69, § 1, 16 Stat. 94. The laws provided that segments of land, known as "O & C lands," were to be conveyed to the railroad as construction advanced. They also provided that mineral lands were not to be granted to the railroad. Pet. App. A22-A23. All of the land at issue is in "Section 19," an area in Douglas County, Oregon, and was conveyed to the railroad in 1895 (*id.* at A33). The railroad failed to comply with the conditions of the laws providing for the land grants (see *Oregon & Cal. R.R.* v. *United States*, 238 U.S. 393 (1915)), and in 1916 Congress declared that the title to certain of the O & C lands revested in the United States. Act of June 9, 1916, ch. 137, § 1, 39 Stat. 218-219.

Congress three times legislated with respect to the use of the revested O & C lands. The 1916 Act provided for mineral entries on the revested land but "contained a general reservation of the title to timber" to the United States (Pet. App. A24). In 1937, Congress restricted the use of the O & C lands containing timber, such as Section 19, to forestry use, thus prohibiting the location of mining claims there. Act of Aug. 28, 1937, ch. 876, § 1, 50 Stat. 874. Eleven years later, in 1948, Congress provided that "notwithstanding any provisions of the Act of August 28, 1937 (50 Stat. 874), or any other Act relating to the * * * Oregon and California Railroad," all of the revested O & C lands were open to mineral claims. It further validated mineral claims made since the 1937 Act, providing, however, that mineral claimants "shall not acquire title, possessory or otherwise, to the timber, now or hereafter growing thereon." Act of Apr. 8, 1948, ch. 179, 62 Stat. 162. Thus, Congress at all times reserved to the United

States title to the timber on the revested O & C lands. Accordingly, although a valid mining claim normally encompasses the resources on the surface (*Del Monte Mining & Milling Co.* v. *Last Chance Mining & Milling Co.*, 171 U.S. 55 (1898)), any mineral patent issued on O & C lands pursuant to the Acts of 1916 or 1948 did not convey the timber on the land.

In 1955, Congress enacted a general law providing for the multiple use of public lands. Act of July 23, 1955, ch. 375, 69 Stat. 367 (the Act). Section 4 of that Act, 30 U.S.C. 612, provides that, with respect to any mining claim "hereafter located" on public lands, timber rights are reserved to the United States. Section 5 of the Act, 30 U.S.C. 613, provided a procedure for determining whether a valid mineral claim had been located before the 1955 Act took effect. Petitioners and their predecessors in interest filed a statement alleging that they had located claims on the lands at issue prior to 1955, and the Bureau of Land Management accepted that statement in 1966 (Pet. App. A72-A74).

The Bureau of Land Management issued a mineral patent to petitioners in 1983 for five lots in Section 19 totalling about 115 acres, reserving the timber to the United States. The parties agreed that the claims for four of the lots were located in the 1930s, prior to the effective date of the 1937 Act (Pet. App. A40), and thus subject to the 1916 Act. The district court found that the fifth lot was located in 1938 and thus subject to the 1948 Act (*id.* at A41). Petitioners challenged the reservation of timber rights, but the Interior Board of Land Appeals affirmed the Bureau of Land Management's denial of their protest (*id.* at A44-A71). Petitioners sought review of that decision. A magistrate recommended that the district court grant summary judgment to the federal defendants (*id.* at A17-A43), and the district court adopted the magistrate's findings

and recommendation (*id.* at A14-A16). The court of appeals affirmed (*id.* at A1-A12).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

Petitioners first contend (Pet. 8-12) that Section 19 is not part of the O & C lands that revested in the United States pursuant to the 1916 Act, and, therefore, there is no basis for the reservation of timber rights. A district court determined which lands revested pursuant to the 1916 Act in the 1920s (*United States* v. *Oregon & Cal. R. R.*, 8 F.2d 645 (D. Or. 1925)), ruling that nearly two million acres of the O & C lands did not revest in the United States because they were mineral lands that were never conveyed to the railroad under the Acts of 1866 and 1870. Petitioners contended below that Section 19 was included in the acreage that did not revest, although it is undisputed that Section 19 was conveyed to the railroad in 1895 (Pet. App. A33), because prior to 1895 five mineral claims were located there. The Interior Board of Land Appeals (Pet. App. A57-A61), the district court (*id.* at A33-A40), and the court of appeals (*id.* at A7) all rejected petitioners' contention. As the district court explained: "The fact that a mining claim may have been filed in section 19 by other persons prior to the issuance of a patent to the railroad does not establish that the land was mineral in character. Many mining claims are filed that are subsequently declared invalid" (*id.* at A34). Moreover, as the district court concluded, "section 19 was specifically identified in the court's decree" entered in 1926 in the proceeding to determine which O & C lands revested in the United States as land that had revested (*id.* at A36, A39-A40). Petitioners do not dispute that the 1926 decreee identified Section 19 as

revested land. Accordingly, as the court of appeals concluded, their claim that it did not revest fails " for want of proof" (*id.* at A7).

Petitioners next contend (Pet. 12-17) that the 1966 proceeding before the Bureau of Land Management conclusively established their right to the timber on the land encompassed by their claims. That contention was also correctly rejected by the Interior Board of Land Appeals (Pet. App. A62-A68), the district court (*id.* at A26-A33), and the court of appeals (*id.* at A8-A10). The 1966 proceeding, conducted pursuant to Section 5 of the 1955 Act, determined that petitioners and their predecessors in interest had located mineral claims prior to the effective date of the 1955 Act, so that they were not barred *by that Act* from taking title to the timber on the land. But, as the district court explained, the 1966 proceeding "did not give [petitioners] any rights but merely recognized that the 1955 Act did not deprive [them] of any right they had theretofore possessed" (Pet. App. A32). Section 7 of the 1955 Act, 30 U.S.C. 615, provides that "nothing in this Act shall be construed * * * to limit or repeal any existing authority to include any reservation, limitation or restriction in any [mineral] patent * * * which is otherwise authorized by law." The 1916 and 1948 Acts relating to the O & C lands are such authority mandating the reservation of the timber on revested lands to the United States. Accordingly, under Section 7, the reservations required by those Acts were not affected by the 1955 Act.

Finally, the court of appeals correctly rejected (Pet. App. A10-A11) petitioners' contention (Pet. 17-24) that there is no authority for the reservation of timber rights on those of its claims located prior to 1937 because the 1937 Act repealed the 1916 Act. The 1937 Act provided that "notwithstanding any provision[ ] in the Act[ ] of June 9, 1916, * * * such portions of the revested Oregon and California Railroad * * * grant lands * * * which have

heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield for the purpose of providing a permanent source of timber supply" (§ 1, 50 Stat. 874). As petitioners note (Pet. 19-20), the Department of the Interior concluded that the 1937 Act repealed that portion of the 1916 Act authorizing mining on O & C timberland because it was contrary to the 1937 Act. But, as the court of appeals concluded (Pet. App. A11), nothing in the 1937 Act indicated that Congress intended "to recognize timber rights attached to mining claims located after 1916." Accordingly, the provision of the 1916 Act reserving timber rights to the United States was not in conflict with any provision of the 1937 Act, and hence was not repealed by it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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